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No. 82-1466

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNEMARIE PATTERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's transportation of illegal aliens in the United States violated 8 U.S.C. 1324(a)(2).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1982. See 693 F.2d 134. A petition for rehearing was denied on January 4, 1983 (Pet. App. 3a-4a). See 696 F.2d 1007. The petition for a writ of certiorari was filed on March 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. 1324(a) is reproduced in pertinent part at Pet. 2.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia petitioner was convicted on six counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2). She was sentenced to a five-year term of imprisonment on each of the six counts. The sentence was suspended except for four consecutive six-month terms of imprisonment, to be followed by a five-year period of probation. The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial established that petitioner worked as a labor contractor for several farmers in Georgia, Florida and Alabama (Tr. 10-12, 32-35, 44-47). Six illegal aliens who worked for petitioner testified at trial.[1] Each had entered the United States illegally during the period from January 1980 through June 1981 (Tr. 58-60, 94-95, 115-116, 129-130, 144-145, 158). The initial work contact in the United States for each of the aliens was with petitioner, who arranged for payment of their transportation costs from the Mexican border to locations in either Florida or Georgia (Tr. 63-67, 96-98, 116-118, 130-134, 145-147, 158-161, 236).[2] Petitioner arranged for the aliens to work at various farms in Georgia, Florida and Alabama and provided for their housing at the work locations (Tr. 11-14, 33-37, 46-49, 72-74, 97, 101-102, 120, 239). Finally, petitioner provided the illegal aliens with transportation in her vehicles to work sites in those three states (Tr. 70-72, 98-104, 119-120, 134-139, 149-153, 162-165, 222-223).

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[1]Transportation of these six aliens formed the basis for the six counts on which petitioner was convicted.

[2]Petitioner recouped the cost of transportation of each alien from the border to Florida or Georgia by means of deductions from the alien's weekly pay (Tr. 67-68, 147, 160).

The court of appeals rejected all of petitioner's challenges to her conviction (Pet. App. 1a-2a). It concluded that the evidence that she knowingly and willfully transported aliens in violation of the statute was "overwhelming" (*id.* at 2a). The court of appeals also concluded that the trial court did not improperly limit petitioner's examination of witnesses and that the instructions to the jury were proper (*ibid.*).[3]

ARGUMENT

1. Petitioner first contends (Pet. 5-8) that Congress did not intend to prohibit transportation of illegal aliens that is not directly associated with the entry of such aliens into the United States. That contention lacks merit.

The statute under which petitioner was convicted, 8 U.S.C. 1324(a)(2), condemns any transportation of an illegal alien if the defendant knows that the alien's last entry into the United States occurred less than three years before. Under petitioner's construction of the statute, transportation of an illegal alien two and a half years after his entry into the country would fall outside the scope of the statute, since it would not be an activity "directly associated with the entry of undocumented aliens into this country" (Pet. 5). This construction on its face is at odds with the statute. Moreover, it is well established that 8 U.S.C. 1324(a) extends well beyond the chain of the smuggling process.[4] See *United States* v. *Rubio-Gonzalez*, 674 F.2d 1067, 1071,

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[3]The court of appeals also noted that petitioner's counsel failed to object to the jury instructions with the degree of specificity required by Fed. R. Crim. P. 30 (Pet. App. 2a).

[4]Petitioner cites the fact that in enacting the forfeiture provisions of 8 U.S.C. (Supp. V) 1324 Congress focused primarily on seizure of vehicles used in smuggling aliens across the border (Pet. 6-8). However, Congress' justifiable desire to remove such vehicles from the smuggling trade cannot be said to have repealed by implication the clear criminal prohibition on transporting illegal aliens within the United States.

1073 (5th Cir. 1982); *United States* v. *Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); *United States* v. *Lopez*, 521 F.2d 437, 441 (2d Cir.), cert. denied, 423 U.S. 995 (1975); *United States* v. *Acosta de Evans*, 531 F.2d 428, 430 & n.4 (9th Cir.), cert. denied, 429 U.S. 836 (1976).

2. Petitioner also contends (Pet. 8-10) that the decision below is tantamount to a criminal prohibition on the mere employment of undocumented aliens. That contention is incorrect. Contrary to petitioner's suggestion (Pet. 8-9), the district court did not instruct the jury that the mere employment of undocumented aliens was illegal. Rather, it stated accurately (Pet. App. 9a) that the act of furnishing a job to an alien is one example of an action that could be "in furtherance of" the alien's continued illegal presence in the United States, as part of an effort to explain the meaning of the statutory phrase, "transports * * * in furtherance of such violation of law."[3] The court made it clear (*ibid.*) that the jury was to focus on whether there was "transporting in furtherance of" the alien's remaining in the United States illegally. The court's brief reference to employment for purposes of explaining a term used in the statute does not lead to the conclusion that the decision below effectively prohibits the employment of undocumented aliens.

3. Petitioner contends further (Pet. 10-11) that review is warranted because of the possible impact of the decision below on numerous individuals who give transportation to the millions of illegal aliens in the United States. But contrary to petitioner's suggestion (Pet. 11), the district court's

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[3]Petitioner partially quotes (Pet. 9) the district court's comments concerning this aspect of the instructions. However, petitioner omits the latter part of the court's statement, which makes clear that it was discussing whether employment of an illegal alien could be said to be "in furtherance of" his continued presence in the United States, not whether such employment itself is illegal.

instructions do not state that "*any* transportation of an undocumented alien constitutes a violation" of the statute. The district court instructed the jury concerning all the elements of the offense, including knowledge that the alien entered the country illegally and knowledge that such entry had occurred within the previous three years. More importantly, the district court instructed that the transportation must be "in furtherance of" the illegal aliens' continued presence in the United States (Pet. App. 7a-10a).

Petitioner's real quarrel is with the court's instruction concerning the meaning of transportation "in furtherance of" an alien's continued presence in the United States. Petitioner characterizes her activities as merely akin to employment and, in her view, outside the intended reach of the statute. However, 8 U.S.C. 1324(a) provides that employment of an illegal alien (including usual and normal practices incident to employment) is not deemed to constitute "harboring";[6] there is no such exception in the case of persons transporting illegal aliens to places where they may find work. See *United States* v. *Moreno*, 561 F.2d 1321, 1322 (9th Cir. 1977); *United States* v. *Gonzalez-Hernandez*, 534 F.2d 1353, 1354 (9th Cir. 1976). See also *United States* v. *Rubio-Gonzalez*, *supra*, 674 F.2d at 1073-1074 n.5; *United States* v. *Tamayo*, 427 F.2d 1072, 1074 (9th Cir. 1970). Furthermore, even if petitioner had been charged with harboring, her conduct also included provision of shelter and other services and was otherwise so egregious that the employment exception would not apply. See *United States* v. *Herrera*, 584 F.2d 1137, 1144-1145 (2d Cir. 1978); *United States* v. *Lopez*, *supra*, 521 F.2d at 441-442. For example, petitioner paid the transportation costs of the

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[6]The scope of the employment exception under 8 U.S.C. 1324(a) is well established. See *United States* v. *Herrera*, 584 F.2d 1137, 1144-1145 (2d Cir. 1978); *United States* v. *Cantu*, *supra*, 557 F.2d at 1177-1178; *United States* v. *Lopez*, *supra*, 521 F.2d at 440.

illegal aliens from the Mexican border to her location; in one case she spoke by telephone with a worker in Mexico and assured him work if he entered the country (Tr. 116); she transported illegal aliens to work sites throughout a tri-state area; and she arranged for housing for the illegal aliens at various work sites. See page 2, *supra*. On these facts, petitioner can hardly contend that her conviction will set a precedent capable of ensnaring "many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise." *United States* v. *Moreno*, *supra*, 561 F.2d at 1323.

4. Petitioner contends finally (Pet. 11-12) that the decision below conflicts with the decision of the Ninth Circuit in *United States* v. *Moreno*, *supra*. No such conflict exists, since *Moreno* is clearly distinguishable on its facts.

In *Moreno* the defendant was a foreman for a reforestation company. While driving a number of workers to a job site he was stopped by immigration officials who arrested several of the workers who were illegal aliens. The evidence indicated that Moreno was aware of the immigration status of the aliens. Moreno was convicted of violating 8 U.S.C. 1324(a), but the Ninth Circuit reversed, holding that his "mere transportation" of the illegal aliens was not shown to be sufficiently in furtherance of their violation of law. In so ruling the court noted that Moreno had been required to transport the aliens as part of his work for the reforestation company and that his superiors in the company had not been charged with any violation. 561 F.2d at 1322 & n.4.

As the *Moreno* court recognized, there are various types of transportation of illegal aliens, ranging from the clearly appropriate to the clearly criminal. Thus, the court believed, based on humanitarian considerations, that the transportation of an illegal alien to a hospital following an injury or an

accident would not be prohibited by the statute. 561 F.2d at 1322 n.3. The court in *Moreno* expressly stated that it was not holding that any transportation of an illegal alien in connection with employment was beyond the purview of the statute. *Id.* at 1323. The court held only that transportation of illegal aliens by someone who is required to do so as part of his employment is not clearly criminal in nature. In contrast, petitioner's actions were clearly criminal; perhaps only direct involvement with actual smuggling would come closer to the heart of the statutory prohibition. Petitioner paid for the transportation of the illegal aliens from the Mexican border to her location; she arranged work for them and arranged for their housing at the work sites; she herself engaged in much of the transportation of the aliens; and, finally, she ran her own labor contracting business and thus, unlike *Moreno*, was not in the position of a paid employee required to transport illegal aliens. There is no doubt that such conduct falls within the prohibition of the statute. See *United States* v. *Bazan*, 637 F.2d 363 (5th Cir.), cert. denied, 451 U.S. 993 (1981); *United States* v. *Herrera*, *supra*, 584 F.2d at 1145; *United States* v. *Lopez*, *supra*, 581 F.2d at 441; *United States* v. *Savard*, 493 F.2d 490 (5th Cir.), cert. denied, 419 U.S. 896 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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